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No. 99-

IN THE

Supreme Court of the United States

GIA KALYNA JANAKAKIS-KOSTUN,

Petitioner,

v.

EMMANUEL JANAKAKIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article 13b of the Hague Convention on the Civil Aspects of International Child Abduction permits a court to deny a petition to return a child to the country of the child's habitual residence, where "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (the "grave risk" exception).

1. Does the "grave risk" exception require a court to exclude evidence of alleged "physical or psychological harm" (including admitted evidence of violence in the home), if such harm does not include evidence of direct physical abuse of the child?

2. Before a trial court may deny a petition for return of the child under the "grave risk" exception, is the court also required to find that the country of habitual residence is unable to provide the child with adequate protection, when that requirement is not found in the plain language of Article 13b?

RULE 29.6 STATEMENT

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Gia Kalyna Janakakis-Kostun, by her undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Court of Appeals in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Kentucky Court of Appeals (App. 1a-17a) is reported at 6 S.W.3d 843. The opinions of the district court (App. 18a-36a; 37a-40a) and the denial of discretionary review by the Supreme Court of Kentucky (App. 47a) are unreported. Related stay proceedings in the Kentucky Court

of Appeals, in the Supreme Court of Kentucky, and in the United States Supreme Court (App. 41a-46a) are unreported.

JURISDICTION

The Kentucky Court of Appeals denied Petitioner's timely appeal on March 19, 1999. The Supreme Court of Kentucky denied Petitioner's timely motion for discretionary review on December 9, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

TREATY AND STATUTORY PROVISIONS INVOLVED

Articles 1, 3, 12, and 13 of the Hague Convention on the Civil Aspects of International Child Abduction are reproduced in the Appendix at 55a-57a. Sections 11601 and 11603 of the International Child Abduction Remedies Act, 42 U.S.C. § 11601–10 (1994), are reproduced in the Appendix at 58a-61a.

STATEMENT OF THE CASE

Petitioner seeks review of the Kentucky Court of Appeals' adoption of a narrow construction of the "grave risk" exception under the Hague Convention on the Civil Aspects of Child Abduction ("Hague Convention" or "Convention"). This construction, which resulted in the lower courts' failure to consider evidence of Respondent's violent behavior and temperament, is at odds with the language and purpose of Article 13b and conflicts with the construction of the "grave risk" exception adopted by other federal and state courts.

Under the Hague Convention, a "wrongful removal" of a child from her country of "habitual residence" requires the return of the child unless one of the Convention's exceptions applies. *See* App. 56a. Article 13b permits a court to preclude the return of the child if the respondent to a Hague

Convention petition proves by clear and convincing evidence that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (hereinafter, the "grave risk" exception). App. 57a; *see also* 42 U.S.C. § 11603(e)(2).

Neither the Convention nor the United States' implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.* ("ICARA"), defines the term "grave risk" or articulates the categories of evidence that courts may consider in determining whether the exception has been met. As a result, both state and federal courts, vested with concurrent jurisdiction under the treaty,[1] have divided over the proper standard to be applied under Article 13b, including the admissibility of evidence proving "physical or psychological harm" and the significance of evidence of domestic violence in the home not directly inflicted upon the child. The split of authority is replicated at the international level, where courts of other signatory countries differ greatly in their construction of the "grave risk" exception.[2]

Because this case reflects the narrow application of the Article 13b standard by some lower state and federal courts, it provides an appropriate opportunity for this Court to resolve a significant disagreement among United States jurisdictions and between United States and foreign court applications of the Hague Convention.

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[1] *See* 42 U.S.C. § 11603(a).

[2] United States courts, in turn, rely upon these conflicting international decisions to support their own Article 13b determinations. *Compare Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) and *In re Walsh*, 31 F. Supp.2d 200, 205-06 (D. Mass. 1998) *with Steffen F. v. Severina P.*, 966 F. Supp. 922, 927 (D. Ariz. 1997) (citing cases decided in other signatory countries).

I. FACTUAL BACKGROUND

This case was initiated by Respondent's March 28, 1997 motion to the Hardin Circuit Court of Kentucky to return the parties' only child, Bronte Judith-Despina ("Bronte"), to Greece pursuant to the Hague Convention.

Petitioner Gia Kostun, a United States citizen, married Respondent Emmanuel Janakakis, a citizen of Greece and a captain in the Greek Navy, on September 2, 1989. Their daughter, Bronte, was born in Greece on October 2, 1991. The parties' marriage deteriorated, and on May 2, 1996, Ms. Kostun permanently departed the marital residence. Both she and Mr. Janakakis initiated custody proceedings in the Greek courts, which resulted in a temporary award of custody to Ms. Kostun on June 28, 1996.

In late July and early August 1996, while Ms. Kostun had temporary custody of Bronte, Ms. Kostun made plans to leave Greece with Bronte. Ms. Kostun's father assisted them. Upon their arrival to the United States, Ms. Kostun and Bronte lived in Kentucky.

In Ms. Kostun's absence, Mr. Janakakis filed for and received custody of Bronte in the Greek courts on February 28, 1997. Following the award of custody, Mr. Janakakis filed a Hague Convention petition for Bronte's return in the Hardin Circuit Court on March 28, 1997.

After a three day trial, the trial court found, *inter alia*, that Ms. Kostun had presented insufficient evidence to satisfy an Article 13b defense. The trial court ordered Bronte's return to Greece on November 12, 1997 (App. 36a) and again by order denying Ms. Kostun's motion to alter, amend, or vacate, on January 28, 1998 (App. 40a).

At trial and on appeal, Ms. Kostun presented numerous accounts demonstrating Mr. Janakakis' violent behavior and temperament in order to establish an Article 13b defense.

First, Ms. Kostun offered evidence that Mr. Janakakis had physically abused Bronte while Ms. Kostun and Bronte lived with Mr. Janakakis. *See Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (App. 11a). In addition, Ms. Kostun alleged that Bronte suffered from physical and emotional abuse after Ms. Kostun left the home, during a period when a Greek court had awarded temporary custody of Bronte to Mr. Janakakis. Specifically, when Mr. Janakakis relinquished custody of Bronte to Ms. Kostun pursuant to a subsequent temporary custody order, Ms. Kostun alleged, but Mr. Janakakis denied, that Bronte was suffering from a variety of physical and emotional problems. *See id.* at 846 (App. 4a). Witnesses also testified that Bronte exhibited a propensity to hoard her food instead of eat it, as well as an irrational fear of dog cages. (Hearing before Judge Steven Bland, Hardin Circuit Court, Video Tape 2: 10/02/97, 14:19:12). Ms. Kostun also offered the testimony of child psychologist David Winsch, who examined Bronte on several occasions and documented the child's signs of psychological, physical, and sexual abuse, but this evidence was rejected by the trial court as not credible. *See* 6 S.W.2d at 850 (App. 12a).

Second, Ms. Kostun offered evidence that Mr. Janakakis had physically abused Ms. Kostun on a number of occasions. Mr. Janakakis acknowledged inflicting violence on Ms. Kostun (which required Ms. Kostun's hospitalization). *See id.* at 850 (App. 11a-12a). Ms. Kostun also demonstrated that several of the custody proceedings in Greece were conducted entirely in Greek, and that Ms. Kostun (who does not speak the language) did not have a court-appointed interpreter.[3] (Tape 3: 10/03/97, 11:37:34)

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[3] The U.S Department of State has documented that the courts of Greece frequently minimize allegations of domestic violence. *See* U.S. Department of State, *Greece Country Report on Human Rights Practices for*

Third, Petitioner offered, on appeal, the translated opinion of a June 28, 1996 order of the Lower Court of Chania, Greece (hereinafter "Chania Order") which awarded temporary custody to Ms. Kostun. *See* App. 48a-54a; *see also* 6 S.W.3d at 846, 850 (App. 3a-4a, 12a).[4] The order documented Mr. Janakakis' violent behavior towards Bronte and Ms. Kostun and his authoritarian, manic-depressive and abusive personality. Specifically, the Chania Order found that (1) Mr. Janakakis "regularly struck [Ms. Kostun] with his fists and his guns (he is lieutenant commander of the Navy Force), causing her bodily injuries, as well as hitting their minor daughter," and (2) Mr. Janakakis is "cyclothymic [i.e. manic-depressive], inconsistent, authoritarian and violent." App. 50a.

The Court of Appeals failed to consider the Chania Order and the Greek court's finding that Mr. Janakakis was abusive toward Bronte and Ms. Kostun. In addition, the trial court instructed Ms. Kostun's attorney not to "dwell on" questions about Mr. Janakakis' abuse of Ms. Kostun. (Tape 1: 10/01/97, 15:15:45). Despite numerous accounts of Mr. Janakakis' violent behavior, the trial court, and the Court of Appeals on de novo review, found that only the following facts were established by Ms. Kostun:

> (1) Emmanuel's regular manner of punishing Bronte is to "give her a smack in the back"; (2) on one occasion Emmanuel went into a

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1997, at 10 (Jan. 30, 1998), *cited in* Appellant's Reply Brief at 4, *Janakakis-Kostun* (Ky. Supreme Ct.) (No. 98-SC-123).

[4] Article 13b provides, "[i]n considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." App. 57a.

> violent rage, destroyed items in the house, and pushed Gia and Bronte to the floor; (3) on one occasion Emmanuel pulled Gia's hair so violently during a quarrel that she was hospitalized with severe neck injuries; and (4) on one occasion Emmanuel tore up Bronte's passport.

6 S.W.3d at 850 (App.11a-12a). As detailed below, the Court of Appeals' failure to consider evidence of a generally abusive environment including evidence of Mr. Janakakis' abuse of Ms. Kostun and his authoritarian personality, under an improperly narrow construction of Article 13b, resulted in a finding that Ms. Kostun failed to satisfy an Article 13b defense.

While Ms. Kostun appealed the judgment, the Court of Appeals denied an emergency stay pending appeal on February 11, 1998 (App. 41a). On March 20, 1998, the Chief Justice of the Kentucky Supreme Court granted a temporary stay pending further order of the full Supreme Court (App. 42a-44a). On May 14, 1998, the Kentucky Supreme Court denied Ms. Kostun's motion to reconsider and dissolved the temporary stay entered by the Chief Justice. (App. 45a). On June 18, 1998, Justice John Paul Stevens of the Supreme Court of the United States denied an application to stay the judgment pending appeal. (App. 46a). On March 19, 1999, the Court of Appeals denied Ms. Kostun's appeal. (App. 1a-17a). The Supreme Court of Kentucky denied Ms. Kostun's motion for discretionary review on December 9, 1999. (App. 47a). On June 29, 1998, Ms. Kostun delivered Bronte to Mr. Janakakis, who returned with Bronte to Greece.

II. THE COURT OF APPEALS DECISION

ICARA makes clear that the exceptions to the Hague Convention are to be narrowly construed. *See* 42 U.S.C. § 11601(a)(4). Specifically, when determining whether there

is a "grave risk" of harm, a court may not consider "custody" evidence, or the merits of any underlying custody disputes. *See* 42 U.S.C. § 11601(b)(4); *see also* 6 S.W.3d at 850 (App. 13a). Despite this direction, ICARA does not delineate what constitutes "custody" evidence, or what constitutes "grave risk" evidence, and as a result, courts have diverged over the admissibility of certain categories of evidence presented in support of an Article 13b defense. *Compare Tabacchi v. Harrison,* No. 99 C 4130, 2000 WL 190576, at *12-13 (N.D. Ill. Feb. 10, 2000) (deeming evidence of spousal abuse not probative) *with Rodriguez v. Rodriguez,* 33 F. Supp.2d 456, 462 (D. Md. 1999) (denying petition for children's return by considering evidence of spousal abuse).

In this case, the Court of Appeals delineated the "grave risk" exception by adopting a standard originally articulated in dicta by the United States Court of Appeals for the Sixth Circuit in *Friedrich v. Friedrich,* 78 F.3d 1060, 1069 (6th Cir. 1996):

> [w]e believe that a grave risk of harm for the purposes of the [Hague] Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute – e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

6 S.W.3d at 850 (App. 13a) (quoting *Friedrich,* 78 F.3d at 1069).

In so holding, the Court of Appeals adopted an unduly narrow test for determining "grave risk" – a test that would preclude the trial court from considering evidence of harm such as violence in the home and the serious psychological disorders of a Hague Convention petitioner. Under that standard, even assuming that the Hague Convention petitioner's home country is not a "zone of war, famine, or disease," the respondent still must satisfy both elements of a two-part test. First, the Hague respondent must demonstrate clear and convincing evidence of "serious abuse or neglect" committed by the petitioner directly against the child. The Kentucky courts concluded that evidence of spousal abuse, as Ms. Kostun presented, was "not competent evidence" under this standard, where the harm was directed to the spouse, not directly to the child. *See id.* at 851 (App. 13a) (finding "no competent evidence that *Bronte* has been abused or neglected by Emmanuel.") (emphasis added). Second, the respondent also must demonstrate that that the courts of the child's habitual residence are unable or unwilling to protect the child from the demonstrated harm.

Under this restrictive test, the Court of Appeals ignored significant portions of the evidence presented by Ms. Kostun and affirmed the trial court's holding that "[m]ost of the evidence presented by Gia was more closely akin to that which might be relevant in a custody proceeding." *Id.* at 850 (App. 12a). However, no court has determined that the evidence indicating that Mr. Janakakis had a violent temperament with the potential for, and history of, abusing his wife, is unsubstantiated. To the contrary, the trial court and appellate courts in Kentucky have dismissed this evidence as irrelevant "custody" proceeding evidence. As discussed below, this result is at odds with the construction of the "grave risk" exception adopted by other courts on nearly identical facts.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE DISAGREEMENT AMONG STATE AND FEDERAL COURTS CONCERNING EVIDENCE TO BE CONSIDERED IN ESTABLISHING THE "GRAVE RISK" EXCEPTION

A. Overview Of The Disagreement Among Lower Courts

In adopting the Article 13b test articulated by the Sixth Circuit in *Friedrich,* the Kentucky Court of Appeals aligned itself with other courts that have limited "grave risk" to those situations where the Hague Convention petitioner has directly abused the child, rather than where the petitioner has inflicted physical or psychological harm on the child through other means, such as spousal abuse. *See, e.g, Croll* v. *Croll*, 66 F. Supp.2d 554, 561 (S.D.N.Y. 1999) ("[T]he Article 13 exception is only applicable when a child, as opposed to a parent, would be placed in danger"); *In re Walsh*, 31 F. Supp.2d 200, 205 (D. Mass. 1998) (grave risk "must be directed at the children"); *Freier v. Freier,* 969 F. Supp. 436, 442 (E.D. Mich. 1996) (evidence of psychological harm "is only relevant if it helps prove the existence of one of [the *Friedrich* exceptions]"); *Zarate v. Perez*, No. 96 C 50394, 1996 WL 734613, at *4 (N.D. Ill. Dec. 23, 1996) (not considering evidence that the petitioner sexually abused the child's sibling); *In re Petition for Writ of Habeas Corpus for Coffield*, 96 Ohio App.3d 52, 57, 644 N.E.2d 662, 665 (Ohio App. Ct. 1994) (refusing to consider any information about the specific family environment to which the child would return); *Cf. Tabacchi*, 2000 WL 190576, at *12-13 (although the court's inquiry "must encompass some evaluation of the people and circumstances" awaiting the child, evidence of spousal abuse was irrelevant); *Currier v. Currier*, 845 F. Supp. 916, 923 (D. N.H. 1994) (although the court is required to consider "the

surroundings" to which the child will be sent, the court's focus was limited to the grave risk "that the situation seriously presents for the children").

Other courts, however, have rejected the standard articulated by the Sixth Circuit as "too narrow and mechanical." *See Tahan v. Duquette*, 259 N.J. Super. 328, 335, 613 A.2d 486, 489 (N.J. Super Ct. App. Div. 1992) ("[A] court in the petitioned jurisdiction, in order to determine whether a realistic basis exists for apprehensions concerning the child's physical safety or mental well-being, must be empowered to evaluate the surroundings to which the child is to be sent and the basic personal qualities of those located there."); *accord Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 378 (8th Cir. 1995) ("To ensure that the child is adequately protected, the Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence."); *Blondin v. Dubois*, 78 F. Supp.2d 283, 298 (S.D.N.Y. 2000) ("The gloss placed on Article 13b by the Sixth Circuit . . . is unwarranted and narrows the 'grave risk' exception to the point where it is virtually written out of the Convention."); *Steffen F. v. Severina P.*, 966 F. Supp. 922, 927 (D. Ariz. 1997) (rejecting *Friedrich* as too narrow).

Some courts, while not explicitly rejecting *Friedrich,* have similarly extended the "grave risk" exception to include considerations of evidence beyond narrow proof of direct physical or sexual abuse of a child and have examined the behavior and character of the Hague Convention petitioner. *See, e.g., Blondin v. Dubois,* 189 F.3d 240, 242 (2d Cir. 1999) (affirming finding of grave risk where trial court had examined spousal abuse and other factors); *Rodriguez,* 33 F. Supp.2d at 460 (denying father's petition for return of children where he had regularly beaten their mother in addition to child); *Krishna v. Krishna*, No. C 97-0021 SC, 1997 WL

195439, at *4 (N.D. Cal. Apr. 11, 1997) (considering, in the absence of evidence of a "direct threat" to the child, the "tempestuous" nature of the relationship between the parents); *Steffen*, 966 F. Supp. at 927-28 (holding that "bonding and attachment" between child and mother is by itself sufficient to find grave risk); *Panazatou v. Pantazatos*, No. FA 960713571S, 1997 WL 614519, at *3 (Conn. Super. Ct. Sept. 24, 1997) (finding "grave risk" where child's separation from her mother would cause psychological harm); *cf. Ciotola v. Fiocca*, 86 Ohio Misc.2d 24, 684 N.E.2d 763 (Ohio C.P. 1997) (considering spousal abuse but finding insufficient proof of harm to the child); *Renovales v. Roosa*, No. FA 91 0392232 S, 1991 WL 204483, at *5-6 (Conn. Super. Ct. Sept. 27, 1991) (considering cultural differences between two environments and granting child's return to father because he was "a man who loves his children, has provided for them adequately, and who wants the best for his kids").

- The inconsistent treatment of evidence of spousal violence illustrates the disagreement among lower courts as to the evidence that may be considered in establishing the "grave risk" exception. Some courts find that the psychological effects of spousal abuse on the child are no different from the psychological effects of physical abuse of the child, and consider it accordingly. *See, e.g., Rodriguez*, 33 F. Supp.2d at 461 (noting testimony that the child who witnessed her father abusing her mother and brother suffered from the same symptoms as her abused brother).[5] Other courts categorically

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[5] Numerous experts and scholars have documented that "merely witnessing parental violence is detrimental" to a child's psychological and developmental health. Hon. Sheila M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 284 (1999). In fact, "[o]bserving domestic violence is as harmful for children as experiencing direct physical violence." Daniella Levine, *Children in Violent Homes: Effects and Responses*, 68-OCT

distinguish the harm to the child from the harm to the spouse in order to exclude spousal abuse evidence. *See Tabacchi*, 2000 WL 190576, at *12; *Croll*, 66 F. Supp.2d at 561-62; *Walsh*, 31 F. Supp.2d at 205.

In this case, Mr. Janakakis' repeated acts of violence against Ms. Kostun, as well as Bronte, and his volatile psychological state, are critical aspects of the environment to which Bronte would be (and has been) exposed upon return to Greece. The Court of Appeals' failure to consider facts relating to the environment to which the child would return is at odds with the decisions of several other courts faced with similar cases. *See Rodriguez*, 33 F. Supp.2d at 461-62; *Blondin*, 78 F. Supp.2d at 294-95; *Krishna*, 1997 WL 195439, at *1; *Steffen*, 966 F. Supp. at 927-28; *Panazatou*, 1997 WL 614519, at *3.

B. The Kentucky Court Of Appeals Diverged From *Friedrich* By Requiring "Certain" Harm

Notwithstanding the apparent disagreement among lower courts, and even assuming that the *Friedrich* test is the appropriate one, the Kentucky Court of Appeals erred by construing the "grave risk" test even more narrowly than the language of *Friedrich* (or the plan language of the treaty) permits. For this reason alone, certiorari is appropriate to correct the erroneously narrow standard adopted by the Court of Appeals.

The Court of Appeals construed the *Friedrich* language more strictly than the *Friedrich* court itself, by requiring the

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FLA. B.J. 62, 63 (1994); *accord* Pauline Quirion et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501, 508 (1997); Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1112 (1995).

Hague Convention respondent to prove by clear and convincing evidence "certain danger," rather than a "grave risk of harm." 6 S.W.3d at 851 (App. 13a) (rejecting Ms. Kostun's Article 13b defense because, in the Court's opinion, there was no evidence that "Bronte faces *certain* danger in Greece") (emphasis added). Neither *Friedrich* nor the plain language of Article 13b supports the imposition of a "certain danger" requirement. Rather, Article 13b clearly states that a party opposing a petition under the Convention must show by clear and convincing evidence that "there is a *grave risk* that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." App. 57a (emphasis added). While exceptions to the Convention are to be construed narrowly, *see, e.g., Nunez-Escudero*, 58 F.3d at 376, a "grave risk" of harm does not require a showing of "certain" harm, and indeed, such a requirement is contrary to the plain language of the Convention. Under a "certain danger" standard, even in the most blatant cases of physical or sexual abuse by the petitioner against the child, it would be unreasonably burdensome, if not impossible, for the parent opposing the petition to prove that the child would be at risk of "certain" harm.

Moreover, even under a literal reading of *Friedrich*, which limits the court's considerations to "serious abuse or neglect of the child," 78 F.3d at 1069, the Court of Appeals should have considered the Chania Order, which documented the fact that Mr. Janakakis did in fact physically abuse Bronte. *See* App. 50a. Yet the Court of Appeals, rather than considering this evidence on *de novo* review, made only a passing reference to the Chania Order without acknowledging its full substantive content. *See* 6 S.W.3d at 846 (App. 4a) (noting only that the Chania Order did not disturb an earlier prohibition against Bronte's removal from Greece). This exclusion demonstrates the Court of Appeals' erroneously narrow construction of the "grave risk" exception, which is at odds

with *Friedrich* itself. This error is itself grounds for summary reversal of the judgment below.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG FEDERAL AND STATE COURTS ON WHETHER THE "GRAVE RISK" EXCEPTION REQUIRES AN ADDITIONAL ASSESSMENT OF THE COUNTRY OF HABITUAL RESIDENCE

The Kentucky Court of Appeals, in adopting the Sixth Circuit's construction of "grave risk," required Ms. Kostun to establish not only "serious abuse or neglect" but also that "the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." 6 S.W.3d at 850 (App. 13a). In doing so, the Court of Appeals followed similar decisions that refuse to recognize an Article 13b defense until the Hague Convention respondent establishes the inadequacy of remedies available in the child's home country -- even where the respondent also establishes evidence otherwise sufficient to establish "grave risk." *See, e.g., Blondin,* 189 F.3d at 242 (affirming trial court's finding of "grave risk" but remanding for determination of whether child could nonetheless be returned to France); *Croll,* 66 F. Supp.2d at 562 (concluding that respondent "adduced no evidence that the Hong Kong courts would be incapable or unwilling to protect" the child if she were placed in danger); *Walsh*, 31 F. Supp.2d at 206-07 (declining to find that authorities in Ireland were unwilling or unable to intervene to protect children).

In contrast, other courts have rejected the imposition of this additional requirement not contemplated by the plain language of the Convention, recognizing that a required evaluation of the adequacy of foreign courts impermissibly narrows the meaning of Article 13b. Most notably, the

United States Court of Appeals for the Eighth Circuit expressly rejected this aspect of *Friedrich*:

> We reject [petitioner's] argument. however, that the Article 13b "intolerable situation" exception applies only if the government agencies and courts of Mexico are unable to protect the child if he is returned to that country. It is clear that Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint. If that were all that were required, the drafters of the Convention could have found a clear, more direct way of saying so.

Nunez-Escudero, 58 F.3d at 377 (internal punctuation and citation omitted). The United States District Court for the Southern District of New York, upon remand for a determination of whether children found to be at "grave risk" of harm could nonetheless be protected in France, similarly concluded that:

> [I]n directing me to consider whether other alternatives were available that would allow the return of the children to France while protecting them from harm, the Second Circuit implied that my findings that [petitioner] had seriously abused the children were insufficient to establish a "grave risk of harm" under Article 13b without an additional finding that no other options existed by which the children could be safely returned to France. These interpretations of Article 13b are, in my view, unduly narrow.

Blondin, 78 F. Supp.2d at 298.

Other decisions also reject *Friedrich*'s additional requirement by ending the analysis of "grave risk" once the courts find evidence of harm to the child. *See, e.g., Rodriguez,* 33 F. Supp.2d at 461-62; *Steffen,* 966 F. Supp. at 928-29.

In requiring Ms. Kostun to establish the inadequacy of the Greek court system, the Court of Appeals erroneously narrowed the meaning of Article 13b and implied a provision into the Convention that is not supported by its plain language or purpose. Ms. Kostun presented evidence regarding the leniency of the Greek courts toward domestic violence, and the Greek courts' failure to provide her with an interpreter, but the Kentucky courts did not consider this evidence.

The Court of Appeals' summary conclusion that "there is no evidence that the courts in Greece cannot protect Bronte," 6 S.W.3d at 851 (App. 13a-14a), illustrates how unduly burdensome it would be for any Hague Convention respondent, including Ms. Kostun, to establish an Article 13b defense once allocated this additional burden. *Cf. Blondin*, 78 F. Supp.2d at 287-91 (illustrating the court's expansive assessment of the French government and country pursuant to the Second Circuit's direction to examine the adequacy of the foreign system). Because the Court of Appeals' decision exemplifies a significant split of authority, certiorari is appropriate to determine the proper scope of inquiry under Article 13b.

III. THIS CASE IS THE APPROPRIATE VEHICLE FOR RESOLVING AN IMPORTANT ISSUE ARISING UNDER A FEDERAL TREATY

This is an appropriate case to resolve a significant disagreement among federal and state courts over the proper construction of a central exception under the Hague Convention. This is not an issue where two federal circuits disagree; rather, dozens of federal and state courts have ruled on this

issue. Thus, there is no reason to await further decisions by the lower courts.[6]

As in cases involving statutory or constitutional interpretation, certiorari is equally necessary to resolve the meaning of a federal treaty provision. *See Air France v. Saks,* 470 U.S. 392, 394 (1985) (granting certiorari to resolve a conflict among the Courts of Appeals as to the meaning of a term in the Warsaw Convention). With respect to the Hague Convention in particular, the varied authority among lower courts demonstrates "how difficult it can be for American judges to decide what to do with children in cases governed by international treaties and influenced by differences in cultural, ethnic, or religious heritages."[7]

Certiorari is especially appropriate where, as here, a treaty vests concurrent jurisdiction in federal and state courts. This Court is the only judicial authority that can provide uniform guidance with respect to any law of concurrent jurisdiction.[8] Additionally, under the Hague Convention, the possibility of conflicting decisions is heightened because it implicates both international and domestic family law issues. State courts decide Hague Convention cases without international law

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[6] At least 130 reported or electronically available decisions have applied or cited the Hague Convention since the Convention was enacted into force in the United States in 1988, but this Court has never addressed any case arising under that treaty.

[7] Benjamin Wiser, *Another International Custody Fight, Minus the Spotlight,* N.Y. TIMES NEWS SERV., January 9, 2000.

[8] For example, this Court has required federal law preemption under Section 301 of the Labor Management Relations Act, a statute conferring concurrent jurisdiction, because of "the possibility of conflicting substantive interpretation under competing legal systems [that] would tend to stimulate and prolong disputes." *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962).

expertise, and federal courts decide Hague Convention cases without child welfare law expertise. Certiorari is therefore appropriate to minimize the risk of inconsistent judgments.

Moreover, because a primary purpose of the Convention is to prevent forum shopping to the detriment of the child, *see generally* 42 U.S.C. § 11601, jurisdictional uniformity within the United States is particularly important. Without consistency, parents will consider the leniency of the jurisdiction when deciding whether to file a Hague petition, or alternatively, whether to remove children from the country of habitual residence.

Guidance from this Court is needed, not only to resolve conflicts within the United States, but also to further the United States' important interest in uniform interpretation, as specified in the treaty itself. *See* 42 U.S.C. § 11601(b)(3) (recognizing "the need for uniform international interpretation of the Convention").

In addition, the standard articulated by this Court will likely affect the other signatories' varied interpretations of the same treaty. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1274 (1989). A uniform message to other signatory countries is particularly desirable when the United States' interest in securing the return of abducted American children is involved. The National Center for Missing and Exploited Children estimates that as many as ten percent of 165,000 parental kidnapping cases a year involve one parent taking a child abroad.[9] Fewer than forty percent of American children taken abroad illegally are ever

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[9] Cindy Loose, *Anxious Eyes on Elian Case*, WASH. POST, Feb. 3, 2000, at A1.

returned, according to the U.S. State Department.[10] Certiorari is therefore appropriate to minimize the risk of varied and unpredictable findings of "grave risk" by other signatory countries, or extreme interpretations implicating American children.[11]

For these reasons, a decision by this Court would promote predictability and uniformity in the proper standard to be applied under the "grave risk" exception under Article 13b of the Hague Convention, both in the United States and in other signatory countries.

CONCLUSION

This Court should grant the petition for a writ of certiorari and order plenary briefing and argument or, in the alternative, summarily reverse the judgment below.

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[10] Kelly McBride, *Kids Taken Overseas Usually Stay,* SPOKESMAN REV., Feb. 6, 2000.

[11] Courts in other signatory countries have refused to return American children to the United States with far less evidence of "grave risk" than was presented by Petitioner in this case. For example, the Supreme Court of Ireland recognized an Article 13b exception due to the intolerable situation created by an American father's mismanagement of money. *See* Tom Harper, *The Limitations of the Hague Convention and Alternative Remedies of a Parent Including Reabduction*, 9 EMORY INT'L L.J. 257, 261 (1995) A French court refused to return a child to Los Angeles, where the polluted environment in Los Angeles constituted a danger to the child's health. *See id.* A German court ruled that returning a child to an English-speaking country, after years away from the United States, would establish "severe psychological stress." Loose, *supra note* 9, at A8.

Respectfully submitted,

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MARCH 8, 2000

APPENDICES

Appendix A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 1998-CA-000259-MR

GIA KAYLNA JANAKAKIS-KOSTUN, APPELLANT
v.
IN RE THE APPLICATION OF
EMMANUEL JANAKAKIS, APPELLEE

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 97-CI-00493

OPINION
AFFIRMING

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE. This is an appeal by Gia Kaylna Janakakis-Kostun (Gia) from an order of the Hardin Circuit Court granting the motion of appellee, Emmanuel Janakakis (Emmanuel), to require Gia to relinquish custody of the parties' daughter, Bronte-Judith-Despina (Bronte), to Emmanuel and permitting the return of the child to Greece. This matter arose on Emmanuel's motion to return the parties' child, Bronte, to Greece pursuant to the terms of the Hague Convention on the Civil Aspects of Child Abduction, October 25, 1980, 1988 WL 411501 (entered into

force December 1, 1983) (hereinafter Hague Convention). The Hague Convention has been signed by the United States, and Congress has adopted procedures for its implementation by enactment of the International Child Abduction Remedies Act. 42 U.S.C. § 11601, et seq. Greece is likewise a signatory to the Hague Convention. We affirm.

Emmanuel is a citizen of Greece and a captain in the Greek Navy. In 1986, while on a two-year assignment to the United States Naval Base at San Diego, California, Emmanuel met Gia, a member of the U.S. Navy, and a relationship developed between the parties. In 1988, Emmanuel's tour of duty in the United States ended, and he returned to Greece. At about the same time, Gia decided to leave the U.S. Navy. In November 1988, Gia traveled to Greece to be with Emmanuel, and the parties were married on September 2, 1989. On October 2, 1991, Bronte, was born in Chania, Greece, on the Island of Crete. Following Bronte's birth, Gia and Bronte made yearly visits to the United States to visit Gia's relatives, though, because of conflicting evidence, the trial court was unable to determine the exact dates and duration of the visits. However, Gia and Bronte spent approximately three to four months in the United States in each of the years 1992, 1993, and 1994.

At some point the parties' marriage began to deteriorate, and sometime in 1995 Gia threatened to leave with Bronte. Consequently, Emmanuel began to have concerns about Gia removing Bronte from Greece without his knowledge or permission. On February 24, 1996, Gia told Emmanuel that she was going to the United States and was going to take Bronte with her. Gia thereupon left the marital residence in Chania, taking Bronte with her, and went to Athens with the intention of flying to the United States and settling permanently. Emmanuel thereupon filed a criminal

complaint charging Gia with interfering with his custodial rights.

On February 27, 1996, Emmanuel filed a petition in the Lower Court of Athens, Security Measure Division, seeking temporary custody of Bronte. The Court issued an order prohibiting the removal of Bronte from Greece and scheduled a hearing on the merits of Emmanuel's petition. Gia attempted to leave Greece with Bronte on February 27, but, pursuant to the court order, this was prevented by Greek authorities. Gia alleges that subsequent to her detention, she and Bronte were abused by Greek authorities. On March 28, 1996, a hearing was held in the Athens Court. On April 22, 1996, the Athens Court issued an order prohibiting the removal of Bronte from Greece until a final determination of custody.

On February 28, 1996, the aforementioned criminal charge was heard by an Athens Court. The charges were dropped after the hearing. Emmanuel claims that the charges were dropped because all he wanted was to keep Bronte in Greece, not actually prosecute Gia. Gia claims the charges were dropped following an evidentiary hearing because the judge found the charges to be without merit. In any event, the charges were dropped and Gia was released from custody. Gia and Bronte thereupon returned to live with Emmanuel at the parties' marital residence. On May 2, 1996, Gia departed the marital residence with Bronte and went to the Greece hotel lodgings of her father, George William Kostun. Emmanuel subsequently retrieved Bronte from the hotel and refused to allow Gia to communicate with Bronte.

Also on May 2, Gia filed a petition in the Lower Court of Chania seeking custody of Bronte. On June 28, the Chania Court issued an order, inter alia, assigning "temporarily to [Gia] the care of . . . [Bronte] until issuance of the

final judgment[.]" The Chania order recognized that the April 28 Athens order prohibited the removal of Bronte from Greece and did not set aside or otherwise disturb that prohibition. Pursuant to the Chania order, on July 1, Emmanuel relinquished custody of Bronte to Gia. Gia alleges that upon Bronte's return to her, Bronte was suffering from a variety of physical and emotional problems, though this is denied by Emmanuel. A final hearing was set on Gia's custody petition for September 5, 1996. On July 4, Emmanuel filed a petition seeking specific rights of communication and visitation with Bronte. On July 22, the Chania court awarded Emmanuel liberal visitation and communication rights with Bronte. The order threatened Gia with a fine and imprisonment for violation of the visitation and communication rights established therein.

When Emmanuel subsequently attempted to exercise his communication and visitation rights, he was unable to locate Gia and Bronte. As it turns out, sometime in late July or early August 1996, Gia, with the help of her father, a former Green Beret with multiple European contacts, smuggled Bronte out of Greece. Upon arriving in the United States, Gia and Bronte initially stayed, variously, with Gia's father in Gray Hawk, Kentucky, with Gia's mother in Houston, Texas, and in Elizabethtown, Kentucky. Finally, sometime in the Spring of 1997, Gia and Bronte came to Elizabethtown where they remained.

In the meantime, Emmanuel sought to find his daughter. On July 27, 1996, he filed another action in the Chania Court. A hearing was set on that action for January 16, 1997. On September 5, 1996, the hearing on Gia's petition was held as scheduled. While Gia, no longer in Greece, did not appear, Emmanuel testified that her attorney was present. That hearing was continued until January 16, 1997, so that all pending matters could be heard together. Following

the January 16, 1997, hearing, by order dated February 28, 1997, the Lower Court of Chania assigned "exclusively to [Emmanuel] the exertion and care of [Bronte] [.]"

On November 14, 1996, Emmanuel applied for relief with the Greek Central Authority responsible for implementing the Hague Child Abduction Convention. He first sought enforcement of the Hague Convention in Houston in March of 1997. On March 28, 1997, Emmanuel filed a petition in Hardin Circuit Court pursuant to the Hague Convention, where service on Gia was obtained. On November 13, 1997, the trial court entered an order sustaining Emmanuel's motion for the return of Bronte to his custody and authorizing Bronte's return to Greece. Following a denial of Gia's motion to alter, amend, or vacate, this appeal was taken. On February 11, 1998, this Court denied Gia's petition for an emergency stay of the trial court's order pending appeal; however, on March 20, 1998, Kentucky Supreme Court Chief Justice Robert F. Stephens granted a stay pending further order of the full Supreme Court. On May 14, 1998, the Supreme Court dissolved the temporary stay. On June 18, 1998, United States Supreme Court Justice John Paul Stevens denied Gia's application for a stay pending appeal. On June 29, 1998, Gia delivered Bronte to Emmanuel, and Emmanuel and Bronte returned to Greece.

The Hague Child Abduction Convention and the International Child Abduction Remedies Act each require an abduction or wrongful retention to trigger their provisions and protections. Harsacky v. Harsacky, Ky. App., 930 S.W.2d 410, 413 (1996). Under Article Three of the Hague Convention, removal or retention is considered wrongful where there is a breach of custody rights under the law of the state in which the child was a habitual resident immediately before the removal or retention. Id. It follows that a child cannot be wrongfully removed or retained if the juris-

diction to which the child is taken can be considered its habitual residence. Id. Gia first argues that the trial court erroneously concluded that Greece was the habitual residence of Bronte, and contends that Bronte's habitual residence at the time of her removal was, in fact, the United States.

Neither the Hague Convention nor the International Child Abduction Remedies Act defines "habitual residence." Indeed, it was intended that this concept remain fluid and fact-based, without becoming rigid. Id., citing Brooke v. Willis, 907 F. Supp. 57, 61 (S.D.N.Y. 1995); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993); Friedrich v. Friedrich, 983 F.2d 1396, 1400-1401 (6th Cir. 1993). The definition of habitual residence must be determined by the facts and circumstances presented in each particular case. Id., citing Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). As reflected in Harsacky, the test for determining habitual residence under the settled purpose analysis is broader than domicile.

There are alternative approaches to determining a child's habitual residence, see Harsacky v. Harsacky, supra, however, this Court has previously decided that a determination of habitual residence "must focus on the child, not the parents, and examine past experience, not future intentions." Harsacky, 930 S.W.2d at 415 (quoting Friedrich v. Friedrich, 983 F.2d at 1401). Under this test, the record supports the trial court's determination that Greece was Bronte's habitual residence immediately prior to her removal.

Following Bronte's birth, the parties at all times maintained their home in Greece, and at no time lived together as a family unit in the United States with the intention of making the United States their permanent home. The evidence shows that Bronte's permanent home, at all times following her birth and prior to her removal, was Greece,

and that her three- to four- month trips to the United States in 1992, 1993, and 1994 were temporary visits to this country for the purpose of visiting her maternal relatives. Greece has been the center of Bronte's life.

Gia's argument that the United States was Bronte's habitual residence because the parties held United States social security numbers, bank accounts, driver's licenses, had once consulted with a U.S. realtor, and had plans to move and settle in the United States following Emmanuel's retirement is unpersuasive. These connections do not overcome Bronte's more prevalent and continuing contacts with Greece.

Also unpersuasive is Gia's assertion that her residence in Greece for the year preceding her departure "was not consensual." The Greek Court orders establish that Emmanuel's efforts to prevent Bronte's removal from Greece, though disapproved of by Gia, were pursuant to Greek law. Even if Gia's last year in Greece was "not consensual" – and the evidence is that she could have returned without Bronte to the United States at anytime – this would not alter Bronte's habitual residence from Greece to the United States.

In view of the foregoing factors, the trial court properly concluded that Bronte's habitual residence was Greece.

Gia next contends that the trial court erroneously concluded that Gia breached Emmanuel's custody rights when she left Greece. The objective of the Hague Convention is to protect children who are "wrongfully removed" from their country of habitual residence. Hague Convention art. 1.

> The Hague Convention art. 3 provides as follows:

> The removal or the retention of a child is to be considered wrongful where --
>
> a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;
>
> and
>
> b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in subparagraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

The burden is on the petitioner, here, Emmanuel, to establish that the minor child was wrongfully removed within the meaning of the Hague Convention by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1); In re Ponath, 829 F. Supp. 363 (D. Utah 1993).

Rights of custody may arise by judicial decision.[1] Hague Convention art. 3. The Athens order of April 22,

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[1] Under the Hague Convention, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residency, Hague Convention art. 3; Friedrich,

1996, prohibited Gia from removing Bronte from Greece pending a final resolution of the parties' custody dispute. Admittedly, the Chania decision of June 28, 1996, awarded temporary custody to Gia. The June 28 order, however, also cited the previous prohibition on removing Bronte from Greece. The June 28 order took no action to diminish or lessen the effect of the Athens prohibition of removal. In addition to this, the Chania decision of July 22, 1996, defined liberal and specific visitation rights for Emmanuel and threatened Gia with fines and imprisonment if she violated the provisions of the order. These orders were entered prior to Gia's removal of Bronte and, together, establish beyond a preponderance of the evidence that Emmanuel had custodial rights to Bronte under Greek law by virtue of judicial decision.

Gia's argument, that since the June 28, 1996, Chania order awarded her sole temporary care of Bronte, Emmanuel was divested of all custodial rights, is unpersuasive. The order as translated was, on its face, a temporary order, pending final resolution of the custody issue. Pursuant to the orders, Emmanuel had ongoing "custodial rights" and was, in fact, seeking as a final resolution permanent sole

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938 F.2d at 1402. Neither the trial court, nor either party on appeal, applied or cited relevant Greek statutory or case law relevant to the issue of whether Emmanuel had existing "custody rights" to Bronte at the time of Bronte's removal and whether Emmanuel was "exercising" those "custody rights" at the time of her removal. However, as discussed infra, the record established by a preponderance of the evidence that Emmanuel had custodial rights by "judicial decision," and the ongoing custody litigation in the Greek courts supports that by a preponderance of the evidence he was attempting to "exercise" those rights.

custodial rights for himself. Indeed, following Gia's removal of Bronte, Emmanuel was granted custody of the child by the Chania court in its February 28, 1997 order.

Visitation rights alone, such as those granted to Emmanuel in the July 22, 1996, Chania order have been held to fall within the meaning of "custodial right." See David S. v. Zamira S., 574 N.Y.S.2d 429 (N.Y.Fam. Ct. 1991). David S. acknowledged that visitation rights may not always equate to custodial rights. The case nevertheless held that such a distinction was meritless where a respondent, i.e., the removing parent, engaged in "contemptuous conduct" in removing the child from its habitual residence. In view of the pending court orders prohibiting the removal of Bronte from Greece, Gia similarly acted in contempt of Greek court orders by nevertheless removing Bronte. Accordingly, David S. provides a rule appropriate to this case.

Finally, in view of Emmanuel's active and ongoing legal efforts prior to, at the time of, and subsequent to Gia's removal of Bronte, it is clear that Emmanuel was exercising his custodial rights, or would have but for Gia's removal of Bronte.

Gia next contends that the trial court did not properly consider Gia's evidence that returning Bronte to Greece would subject her to a grave risk of physical and psychological harm under Article 13b. Article 13b establishes an affirmative defense to an otherwise wrongful removal and provides that

> the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --
>
> . . . .

> b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> . . . .
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

A respondent who opposes the return of the child has the burden of proving that the exception set forth in article 13b exists by clear and convincing evidence. 42 U.S.C. 11603(e)(2). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." Rowland v. Holt, Ky., 70 S.W.2d 5, 9 (1934).

Gia alleges that, at trial, she established that Bronte would face an "intolerable situation" if returned to Greece. Gia further alleges that she has established the insufficiency of the Greek judicial system and its unwillingness to protect the interests of non-Greek citizens. In support of this position, Gia cites several examples of violent behavior by Emmanuel toward herself and Bronte. Among these: (1) Emmanuel's regular manner of punishing Bronte is to "give her a smack on the back"; (2) on one occasion Emmanuel went into a violent rage, destroyed items in the house, and pushed Gia and Bronte to the floor; (3) on one occasion Emmanuel pulled Gia's hair so violently during a quarrel that she was hospitalized with severe neck injuries; and (4)

on one occasion Emmanuel tore up Bronte's passport. Gia also refers us to the June 28, 1996, Chania order which recounts accusations of violence by Emmanuel toward herself and Bronte.

Gia moreover presented the testimony of a child psychologist who testified that Bronte was suffering from (1) post-traumatic stress syndrome; (2) probable sexual, physical and emotional abuse; and (3) probable child neglect. The psychologist recommended that Bronte not be returned to Greece. The trial court made a specific finding that it "does not find the psychologist's testimony compelling," and that "[i]t is lacking in substantiation and does not establish that returning Bronte to Greece would subject her to grave and intolerable injury."

We adopt the following analysis of Gia's 13b argument from the order of the trial court:

> The 13(b) exception under the [Hague] Convention must be narrowly construed. Rydder v. Rydder, 49 F.2d 369 (8th Cir. 1995); Nunez-Escudero v. Tice-Menley, 58 F.2d 374 (8th Cir. 1995); Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995). Most of the evidence presented by Gia was more closely akin to that which might be relevant in a custody proceeding. That type of evidence is not relevant in a 13(b) hearing. Tahan v. Dugquette, 613 A.2d 486 (N.J. Super. A.D. 1992); In Re Petition For Coffield, 644 N.E.2d 662 (Ohio App. 11 Dist. 1994). In Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) [ ] Judge Boggs' opinion very succinctly states how the court should view the 13(b) exception:

The exception for grave harm to the child is not license for a court to speculate on where the child would be happier. That decision is a custody matter, and reserved to the court in the country of habitual residence.

Id. at 1068.

Judge Boggs then goes on to define exactly when the 13(b) exception should apply:

[w]e believe that a grave risk of harm for the purposes of the [Hague] Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute – e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Id. at 1069.

The evidence offered by Gia in support of her 13(b) argument, psychological and otherwise, simply does not establish that Bronte faces a grave risk of harm if she is returned to Greece. There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel, or that Bronte faces certain danger in Greece. Likewise, there is no evi-

> dence that the courts in Greece cannot protect Bronte. Indeed, the last order issued before Gia left gave Gia temporary custody, subject to certain conditions. This court has absolutely no reason to believe that the Greek Courts will not properly and adequately decide the ultimate issue of custody, and protect Bronte's interests in so doing. The Court concludes that Gia has failed to satisfy her 13(b) burden.

Gia next alleges that the trial court did not properly consider her evidence that returning Bronte to Greece would violate fundamental principles of human rights under Article 20 of the Hague Convention. More particularly, Gia alleges that (1) the actions of the Greek police in physically removing her and Bronte from a plane in Athens, holding her in isolation at the station for several days without food, water or restrooms, and subjecting her to physical and verbal abuse violated various articles of the International Covenant on Civil and Political Rights, December 16, 1966, 6 I.L.M. 368 (entered into force March 23, 1976) (hereinafter ICCPR); (2) that various articles of the ICCPR were violated when Emmanuel destroyed Bronte's passport and Greek authorities forcibly prevented her and Bronte from moving freely from one place to another; and (3) she was denied assistance of counsel in custody proceedings in violation of the ICCPR. The burden is on Gia to establish an Article 20 exception by clear and convincing evidence. 42 U.S.C. § 11603 (e) (2).

> We adopt the trial court's analysis of this issue:
>
> > Gia also asserts that the return of Bronte to Greece should be denied pursuant to Article 20 of the [Hague] Convention.

Gia's burden under this Article is to show, again by clear and convincing evidence, that the return of Bronte "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.["] [Hague Convention art. 20]. "With respect to an Article 20 defense, it places a heavy burden on the respondent." Caro v. Sher, 687 A.2d 354 (N.J. Super. Ch., 1996). The court in Caro relied on the Explanatory Report as to the adoption of the [Hague] Convention, prepared by Elisa Perez-Vera, to explain Article 20:

To be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the [Hague] Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with those principles . . . A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the [Hague] Convention has in view.

This exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the

> merits or for passing judgment on the political system of the country from which the child was removed.
>
> Caro, supra at 359.
>
> In Gia's case, her complaints are with the way she was treated by the Greek police and court system. Her complaints are no different than those this Court has heard many times before from defendants in proceedings in Kentucky. This Court finds no evidence that the Nation of Greece is suspect in its treatment of Gia and/or Bronte. Gia's Article 20 defense is totally without merit.

Finally, Gia alleges that the trial court's findings of fact should be set aside as clearly erroneous. "Findings of fact shall not be set a side unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ky. R. Civ. Proc. (CR) 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. See Black Motor Company v. Greene, Ky., 385 S.W.2d 954 (1965). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

Gia identifies three examples of erroneous findings by the trial court: (1) the trial court's assertion that "there is simply no evidence in the case before the court that Gia was ever prevented from leaving Greece;" (2) the trial court's erroneous characterization of Gia's departure from Greece as a violation of the Athens court order; and (3) the trial court's disregard of the corroborated testimony pro-

vided by Gia's child psychologist witness which documented Bronte's fragile psychological condition and the severe emotional harm she would suffer if separated from her mother. There was conflicting evidence regarding each of these matters and the trial court, as the finder of fact in this proceeding, was in a better position to weigh the credibility of the witness and resolve the conflicting evidence. There was substantial evidence to support the trial court's findings of fact, and hence we may not set aside those findings.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

RENDERED: March 19, 1999

Appendix B

HARDIN CIRCUIT COURT
DIVISION II

CIVIL ACTION NO. 97-CI-00493

IN RE THE APPLICATION OF
EMMANUEL JANAKAKIS, PETITIONER
v.
GIA KALYNA JANAKAKIS-KOSTUN, RESPONDENT

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT**

INTRODUCTION

This is a proceeding brought by the Petitioner, Emmanuel Janakakis in this Court seeking the return of his daughter, Bronte Judith Despina Anastasia Adair Janakakis (hereinafter referred to as "Bronte"). The Petition is brought pursuant to The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 and 42 U.S.C. 11603(b), the International Child Abduction Remedies Act. Although this is a Division II case, the undersigned as Circuit Judge for Division I of the Ninth Judicial Circuit (Hardin County) heard the evidence in this matter by agreement of the parties due to a conflict with another trial in progress which was heard by the Division II Circuit Judge, the Hon. Hugh Roark. Having heard extensive evidence in this matter over a period of three days of continuous hearings, having considered the

memorandums of law presented by counsel for the respective parties, and being otherwise sufficiently advised, the Court now makes the following Findings of Fact, Conclusions of Law and Judgment.

PRELIMINARY MATTERS

The Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as "Convention") was adopted on October 25, 1980. The United States and Greece were among the signatory States adopting the Convention. Procedures for the implementation of the terms of the Convention in the United States were made by Congress with the enactment of 42 U.S.C. 11601, the International Child Abduction Remedies Act (hereinafter referred to as ICARA). Pursuant to 42 U.S.C. 11603(a) the courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

The objects of the Convention are to (a) secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. (Article 1) The United States Congress, in adopting ICARA found that:

> The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. *Children who are wrongfully removed or retained*

> *within the meaning of the Convention are to be promptly returned* unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and ·· ıtions.

42 U.S.C. 11601(a)(4) (emphasis added).

Pursuant to Article 3 of the Convention, the removal or retention of a child is to be considered wrongful where (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Article 3 further provides that the rights of custody may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith (Article 12).

There are some exceptions to this mandate, however. Under Article 13 of the Convention, the Court can decline to order the return of the child if the person, institution or other body which opposes its return establishes that (a) the person, institution or other body having the care of the per-

son of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Under Article 20 of the Convention, the Court can decline to order the return of the child "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

FINDINGS OF FACT

Emmanuel Janakakis (hereinafter referred to as Emmanuel) is a citizen of Greece and a captain in the Greek Navy. In 1986 he was assigned to the United States Naval Base at San Diego, California for a two year assignment working with the U.S. Navy. During his stay at San Diego, Emmanuel met the Respondent, Gia Kalyna Janakakis-Kostun (hereinafter referred to as Gia), a member of the U.S. Navy, and a relationship developed between the parties.

Emmanuel's tour of duty ended in 1988 and he was required to return to Greece. Gia at about the same time decided to leave the U.S. Navy and in July of 1988 left San Diego for Houston, Texas. Emmanuel visited Gia in August of 1988 in Houston and then returned to Greece. In November of 1988, Gia traveled to Greece to be with Emmanuel. They lived together for approximately ten months before getting married on September 2, 1989 in Athens. After the marriage, they continued to live in Greece.

Gia became pregnant and on October 2, 1991, their daughter, Bronte was born in Chania, Greece. After Bronte's birth, Gia and Bronte made yearly visits to the U.S. to visit relatives. The exact dates and duration of said visits is not clear from the evidence, but in each instance,

Gia and Bronte always returned to Greece. As Bronte grew older, she was enrolled first in daycare and then in preschool in Greece.

During this same time period, Gia's marriage to Emmanuel began to deteriorate, although if one believes Gia's account, the marriage was "bad from the beginning." Sometime in 1995 Gia told Emmanuel that she was going to leave and that she "would take Bronte away and he would never see her big brown eyes again." Understandably, Emmanuel began to worry about Gia removing Bronte from Greece without his knowledge or permission.

On February 24, 1996 Gia told Emmanuel that she was going to the United States and taking Bronte with her. Emmanuel went to the Greek police and filed a complaint (on advice of legal counsel) charging Gia with the apparent Greek equivalent of "custodial interference." The next day Emmanuel filed a petition in the Greek courts for temporary custody of Bronte. The Court issued an order prohibiting the removal of Bronte from Greece and scheduled a hearing on the merits of Emmanuel's petition. A hearing was held on March 28, 1996 wherein Emmanuel was awarded temporary custody of Bronte. The Greek court further ordered that Bronte could not be removed from Greece until a final decision was reached. (Order of the Lower Court of Athens, Security Measure Section, Decision Number 11,213/1996, issued April 22, 1996).

The criminal charge of custodial interference was heard by an Athens court on February 28, 1996. The charges were dropped after the hearing. Emmanuel claims the charges were dropped because all he wanted was to keep Bronte in Greece, not actually prosecute Gia. Gia claims the charges were dropped after an evidentiary hearing in front of a judge because the judge found the charges to be without merit. Regardless of the reasons why, the charges

were dismissed and Gia was released from custody. Interestingly enough, she returned to live with Emmanuel and Bronte.

Gia ultimately proceeded with another petition in court seeking custody of Gia. By order of the Lower Court of Chania, decision number 531/1996, Gia was awarded temporary custody of Bronte, but the previous order of the Athens court prohibiting the removal of Bronte from Greece was recognized and not set aside by the Chania Order. Furthermore, the court set a final hearing date of September 5, 1996 on Gia's petition. Subsequent to the entry of that order, Emmanuel relinquished custody of Bronte to Gia on July 1, 1996. Three days later, Emmanuel appeared in court seeking specific rights of communication and visitation, which were granted per written order of The Lower Court of Chania, decision number 617/1996. The nature of the visitation awarded clearly contemplated that Bronte would be residing in Greece for the foreseeable future, as in fact required by the previous order of the Athens Court.

When Emmanuel attempted to exercise his newly awarded rights of communication and visitation, he soon discovered that Gia and Bronte were nowhere to be found. The fact was that Gia and Bronte had left Greece. The manner of their exit is a fascinating story in and of itself. Aware that a court order existed which prohibited Bronte's removal from Greece, Gia relied on her father, George Kostun to arrange their removal. Mr. Kostun is a former Green Beret and probable CIA agent specially trained to infiltrate and work behind enemy lines in eastern European countries. With the help of a string of contacts in various countries, he smuggled Gia and Bronte out of Greece and ultimately to the United States.

Gia and Bronte lived first one place and then another upon their arrival in the United States. Initially, they lived

with her father, George Kostun in Kentucky. Then Gia and Bronte went to Houston to live. Finally, sometime in the Spring of 1997, Gia and Bronte came to Elizabethtown, Kentucky where they now reside.

While Gia and Bronte were traveling around the United States, Emmanuel was busy trying to find his daughter. He filed another action in the Lower Court of Chania on July 27, 1996. A hearing date was set for January 16, 1997. He attended the September 5, 1996 hearing on Gia's petition, but naturally Gia failed to appear, although her attorney apparently was present. The court in that case also set a hearing date of January 16, 1997 so that both matters could be resolved simultaneously. At that hearing, Emmanuel was awarded exclusive custody of Bronte. (Lower Court of Chania, Decision No. 80/1997).

Prior to the January 16, 1997, hearing Emmanuel also applied for relief on November 14, 1996 with the Greek Central Authority responsible for implementing the Hague Child Abduction Convention. He first sought enforcement of the Convention in Houston in March of 1997, and ultimately in this Court, where service on Gia was obtained.

Conclusions of Law

Pursuant to the terms of the Convention, any person seeking the return of a child must prove that the removal was (a) in breach of rights of custody of the petitioner and (b) at the time of removal, those rights were actually exercised. Convention, Article 3. In addition, the child must have been an habitual resident of the State under which the rights of custody were obtained immediately before the removal. Convention, Article 4. The burden of proof which the petitioner must overcome is a preponderance of the evidence. 42 USC 11603(e). If the petitioner satisfies the requirements of Article 3, and the proceedings were initiated within one year of the removal, the Court must order the

return of the child to the requesting State. Convention, Article 12.

There are narrow exceptions to the mandate of Article 12, found in Article 13(b) and Article 20. Any person asserting these exceptions has the burden of proving they apply by clear and convincing evidence. 42 USC 11603(e). This means that in the case before the Court, the Petitioner, Emmanuel, is operating under a preponderance of the evidence standard, while the Respondent, Gia, must deal with the more difficult clear and convincing evidence standard. Although the "clear and convincing evidence" is not specifically defined under Kentucky law, it is clear that it constitutes a heightened degree of proof beyond the ordinary preponderance of the evidence standard. Harding v. Savageau, Ky., 906 S.W.2d 356 (1995).

Having considered the evidence in this case, the Court concludes that the Petitioner, Emmanuel, has satisfied his burden of proof while the Respondent, Gia, has not. For the reasons set forth below, the Court believes that this case is a classic example of the type of matter for which the Convention and ICARA were adopted, and that Bronte should be returned to Greece for further proceedings in the Greek courts.

HABITUAL RESIDENCE

Habitual residence is not defined in either the Convention or ICARA. The failure is intentional.

> Neither the Convention nor the International Child Abduction Remedies Act defines habitual residence. Indeed, it was intended that this concept remain fluid and fact-based, without becoming rigid.

Harsacky v. Harsacky, Ky. App., 930 S.W.2d 410 (1996).

An excellent discussion of habitual residence can be found in Friedrich v. Friedrich, 983 F.2d 1395 (1993) wherein the Sixth Circuit Court of Appeals held, in considering facts amazingly similar to the case before this Court, as follows:

> A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward.

In Friedrich the child was born in Germany to a German father and an American mother. In our case the child was born in Greece to a Greek father and an American mother. In Friedrich the child lived exclusively in Germany except for a few short vacations. In our case the child lived exclusively in Greece except for yearly vacations to the United States, always returning to Greece to live. In Friedrich, the mother argued that because the child was a United States citizen, had a United States address, and the mother intended to return to the United States with the child at some future date, the child's habitual residence must be the United States. In our case, the child has dual Greek/United States citizenship, has a United States passport and it was the mother's stated intention that she and the child would return to the United States to live sometime in the future. In Friedrich the court rejected the mother's assertions, stating that the ties to the United States, while strong, do not establish habitual residence. The Court specifically held as follows:

> This is a simple case. Thomas was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore,

> we hold that Thomas was a habitual resident of Germany at the time of his removal.

In our case, Bronte was born in Greece and resided in Greece exclusively until her mother, Gia, removed her to the United States on or about July 24, 1996. Moreover, there is no evidence that Emmanuel ever intended or consented to Bronte living in the United States. Harsacky, supra. Indeed, the evidence is all to the contrary. Once it became clear that Gia wanted to remove Bronte to the United States, Emmanuel did everything he could to prevent the removal from occurring.

Gia argues that her presence in Greece after the fall of 1995 was coerced and therefore Greece cannot be considered as Bronte's place of habitual residence, citing Application of Ponath, 829 F. Supp. 363 (D. Utah 1993). The facts in Ponath are entirely different from the facts in this case and the Court does not find Ponath applicable. There is simply no evidence in the case before the Court that Gia was ever prevented from leaving Greece. As for Bronte, it is true that Emmanuel obtained orders from the Greek courts preventing her removal prior to a decision on permanent custody being rendered, but that can hardly be considered an act of coercion. Courts in the United States, the Commonwealth of Kentucky included, routinely issue orders prohibiting the removal of, or restricting the travel of, children while custody matters are pending. In addition, under the domestic violence laws of this Commonwealth (KRS 403.715 et seq.) Courts routinely issue ex parte orders for custody, residency and likewise restrict or deny access of one parent to his/her children. Such acts are permitted under Kentucky law and cannot be considered as wrongful or coercive. For that reason, orders issued by Greek courts prohibiting Bronte's removal from Greece do

not constitute coercive conduct by Emmanuel toward Gia and Bronte.

The Court, like the Sixth Circuit did in Friedrich, believes that this is a simple case on the issue of habitual residence. Bronte's place of habitual residence prior to her removal by Gia was clearly Greece. To paraphrase Friedrich, if this Court were to determine that by removing Bronte from her habitual residence without Emmanuel's knowledge or consent Gia "altered" Bronte's habitual residence, the Court would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence. This Court will not award Gia's removal of Bronte by holding otherwise. The Court concludes that Bronte's habitual residence prior to her removal was Greece.

RIGHTS OF CUSTODY

Prior to Bronte's removal from Greece, first Emmanuel and then Gia obtained orders from Greek courts granting them temporary custody of Bronte. It is undisputed that at the time Bronte was surreptitiously removed from Greece by Gia, Gia had been awarded temporary custody of Bronte. It is also clear that the previous order of the Greek court prohibiting Bronte's removal from Greece was still in effect. In conjunction with the award of temporary custody of Bronte to Gia, Emmanuel was awarded visitation rights which could only be exercised so long as Bronte remained in Greece. The rights awarded Gia were only temporary – final custody rights were to have been determined at the September 5, 1996 hearing for which Gia failed to appear, although her attorney did. As a result of Gia's failure to appear at the September 5 hearing (scheduled at the time of the award of temporary custody), permanent custody of

Bronte was awarded to Emmanuel by the Greek courts on January 16, 1997.

Under these facts, the Court concludes that the removal of Bronte from Greece by Gia was clearly in breach of rights of custody belonging to Emmanuel. A case very similar to ours in this regard is David S. v. Zamira S., 574 N.Y.S.2d 429 (Fam. Ct. 1991). In this case the father had only visitation rights, but the mother was prohibited from removing the children from the metropolitan area of Toronto, Canada. Despite the prohibition, the mother fled Canada to the United States. The father obtained orders of custody from the Canadian court subsequent to the mother's removal of the children.

The New York Court specifically found as follows:

> Respondent's contention that the petitioner is not entitled under the Hague Convention to have their son returned, because he only had visitation (access) rights and not custody, might have some merit but for the respondent's contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario which gave temporary custody of both children to the petitioner.

(Emphasis added.) Id. at 432.

In the case before this Court, Gia has clearly acted in contempt of the order of the Greek Court prohibiting the removal of Bronte from Greece and Emmanuel was awarded permanent custody of Bronte subsequent to her removal. Furthermore, the Convention defines "rights of custody" as primarily the right to determine the child's place of residence. Article 5. Although Gia had an order of temporary custody, it did not give her the right to determine Bronte's place of residence outside of Greece. Thus

Gia's contention that her order of temporary custody grants her the right of exclusive custody is, under the Convention and ICARA, an untenable position.

Also, Emmanuel's award of permanent custody on January 16, 1997 subsequent to the removal of Bronte is enforceable under the Convention and ICARA. Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10505 (1986). Gia's belief that she had custody and could do whatever she wanted with Bronte simply is not correct and does not vitiate her wrongful removal. Emmanuel has sufficient rights of custody under the Convention and ICARA to maintain this action.

ACTUAL EXERCISE OF CUSTODY RIGHTS

The final requirement that Emmanuel must satisfy under the Convention and ICARA is that he actually exercise his rights of custody prior to Bronte's removal. The evidence is clear in this case that prior to Bronte's removal, Emmanuel exercised his rights of custody by providing care to Bronte during the time that Emmanuel, Gia and Bronte lived together, by taking steps to prevent Bronte's removal from Greece pending final orders of custody, by obtaining temporary custody of Bronte for a period of time, by obtaining and attempting to exercise rights of visitation with Bronte, and by taking all available action to secure her return to Greece once Gia had wrongfully removed Bronte. To argue that Emmanuel did not exercise his rights of custody is simply not tenable.

CONCLUSION REGARDING HABITUAL RESIDENCY AND RIGHTS OF CUSTODY

Emmanuel has met his burden under the Convention and ICARA. He has demonstrated by a preponderance of the evidence that 1) Bronte was a habitual resident of Greece

prior to her removal by Gia; 2) Emmanuel had rights of custody at the time of Bronte's removal, and 3) Emmanuel had actually exercised those rights. His application for the return of Bronte was timely filed within one year of Bronte's wrongful removal. This Court must, therefore, order the return of Bronte to Greece and Emmanuel unless Gia can demonstrate by clear and convincing evidence that one of the exceptions in Article 13(b) or Article 20 applies.

ARTICLE 13(b) DEFENSE

Gia asserts that pursuant to Article 13(b) of the Convention, a grave risk exists that would expose Bronte to physical or psychological harm if she is returned to Greece. Gia relies primarily on the testimony of Dr. David L. Winsch, a clinical psychologist. Dr. Winsch first saw Bronte on April 23, 1997 when Gia presented Bronte for examination and evaluation. Since that first visit, Dr. Winsch had seen Bronte 9 or 10 times prior to his testimony in court. Dr. Winsch testified on direct examination that Bronte was suffering from 1) post traumatic stress syndrome; 2) probable sexual, physical and emotional abuse; and 3) probable child neglect. Dr. Winsch recommended treatment for Bronte consisting of individual and family counseling, and a stable living environment. He further indicated that treatment might take years, and the potential for long term emotional behavioral problems is great if treatment is not afforded. Dr. Winsch recommended that Bronte not be returned to Greece.

On cross examination, Dr. Winsch admitted that the sole basis for his diagnosis of probable sexual, physical and emotional abuse were the statements made to him by Gia. No sexual problems appeared in the testing that Dr. Winsch did, neither did Dr. Winsch observe any sexual acting out by Bronte. This lack of sexual acting out is confirmed by the testimony of the four school employees, who each testi-

fied that they had not seen any sexual acting out by Bronte at school. A diagnosis based solely on the self-serving statements of one of the parties is no diagnosis at all, and the Court places no value on this portion of Dr. Winsch's diagnosis.

Dr. Winsch defined post traumatic stress disorder as an "extreme fear reaction from a near death experience. It requires a series of very severe events over a long period of time." Dr. Winsch offered no explanation as to what those events might have been. The evidence in this case offers no explanation for why Bronte might be suffering from this problem (if in fact she is). Emmanuel and Gia lived together with Bronte for the entirety of Bronte's life except for visits to the United States and two months in 1996 when Emmanuel had custody. The only extended period of stress to which Bronte has been subjected that has been proven by the evidence is the surreptitious and harrowing removal of Bronte from Greece by Gia, and the vagabond journey to which Bronte has been subjected thereafter, living here, there and everywhere, and being deprived of all contact with her father. There is absolutely no competent evidence before the Court that Emmanuel is responsible for Bronte's current psychological condition. There is also no evidence before the Court that medical treatment for Bronte is not available in Greece. What little evidence there is suggests just the opposite.

Finally, Dr. Winsch admitted under cross examination, that Rule 7.02 of the Psychologist's Code of Conduct requires that opinions given for purpose of court testimony must have sufficient appropriate substantiation, and that his opinion did not have that substantiation. Also, Dr. Winsch admitted that had he interviewed Emmanuel (which he did not), his opinions would be more credible and reliable.

The Court does not find Dr. Winsch's testimony compelling. It is lacking in substantiation and does not establish that returning Bronte to Greece would subject her to grave and intolerable injury. In Re Prevot, 855 F. Supp. 915 (W.D. Tenn. 1994).

The 13(b) exception under the Convention must be narrowly construed. Rydder v. Rydder, 49 F.2d 369 (8th Cir. 1995); Nunez-Escudero v. Tice-Menley, 58 F.2d 374 (8th Cir. 1995); Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995). Most of the evidence presented by Gia was more closely akin to that which might be relevant in a custody proceeding. That type of evidence is not relevant in a 13(b) hearing. Tahan v. Dugquette, 613 A.2d 486 (N.J. Super. A.D. 1992); In Re Petition For Coffield, 644 N.E. 2d 662 (Ohio App. 11 Dist. 1994). In Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) (hereinafter Friedrich II) Judge Boggs' opinion very succinctly states how the court should view the 13(b) exception:

> The exception for grave harm to the child is not license for a court to speculate on where the child would be happier. That decision is a custody matter, and reserved to the court in the country of habitual residence.

Id. at 1068.

Judge Boggs then goes on to define exactly when the 13(b) exception should apply:

> [w]e believe that a grave risk of harm for the purpose of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning

> the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Id. at 1069.

The evidence offered by Gia in support of her 13(b) argument, psychological and otherwise, simply does not establish that Bronte faces a grave risk of harm if she is returned to Greece. There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel, or that Bronte faces certain danger in Greece. Likewise, there is no evidence that the courts in Greece cannot protect Bronte. Indeed, the last order issued before Gia left gave Gia temporary custody, subject to certain conditions. This Court has absolutely no reason to believe that the Greek Courts will not properly and adequately decide the ultimate issue of custody, and protect Bronte's interests in so doing. The Court concludes that Gia has failed to satisfy her 13(b) burden.

ARTICLE 20 DEFENSE

Gia also asserts that the return of Bronte to Greece should be denied pursuant to Article 20 of the Convention. Gia's burden under this Article is to show, again by clear and convincing evidence, that the return of Bronte "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. "With respect to an Article 20 defense, it places a heavy burden on the respondent." Caro v. Sher, 687 A.2d 354 (N.J. Super. Ch. 1996). The court in Caro relied on the Explanatory Report as to the adoption of

the Convention, prepared by Elisa Perez-Vera, to explain Article 20:

> To be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with those principles. . . . A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.
>
> This exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed.

Caro, supra at 359.

In Gia's case, her complaints are with the way she was treated by the Greek police and court system. Her complaints are no different than those this Court has heard many times before from defendants in proceedings in Kentucky. This Court finds no evidence that the Nation of Greece is suspect in its treatment of Gia and/or Bronte. Gia's Article 20 defense is totally without merit.

JUDGMENT

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Application of the Petitioner, Emmanuel Janakakis, is SUSTAINED and the Respondent, Gia Kalya Janakakis-Kostun is directed to deliver Bronte Janakakis FORTHWITH to the Petitioner or his designated representative.

2. That until such time as delivery of Bronte to the Petitioner occurs, Respondent shall not remove Bronte from Hardin County, Kentucky without written order of this Court.

3. Respondent shall be responsible for transportation costs related to the return of Bronte to Greece, as well as all other costs and expenses, including reasonable attorney fees, as permitted under 42 USC 11607(b)(3).

This is a final and appealable Judgment made this 12th day of November, 1997.

/s/_____
T. STEVEN BLAND, JUDGE
HARDIN CIRCUIT COURT
DIVISION I

Appendix C

HARDIN CIRCUIT COURT
DIVISION II

CIVIL ACTION NO. 97-CI-00493

IN RE: THE APPLICATION OF
EMMANUEL JANAKAKIS, PETITIONER
v.
GIA KALYNA JANAKAKIS-KOSTUN, RESPONDENT

ORDER

This matter is before the Court on motion of the Respondent seeking that the Court grant all or part of the following relief:

A. To alter, amend or vacate the Court's Findings of Fact, Conclusions of Law and Judgment dated November 12, 1997 and formally entered on November 13, 1997, pursuant to CR 59.05;

B. For a new trial pursuant to CR 59;

C. To amend the Judgment and make additional findings of fact pursuant to CR 52.02;

D. To re-open the testimony of the previous proceedings in lieu of ordering a new trial;

E. That the Court suspend and stay its final order in this matter pending any appeal pursuant to CR 62 and 65.08.

This Court made lengthy findings of fact as part of its Judgment entered November 13, 1997. The complaints of the Respondent with respect to those findings primarily consist of the argument that the Court did not make specific findings as to certain items of testimony heard during the three day trial of this matter.

When a case is tried before a Court without a jury, the Court is required to make specific findings of fact pursuant to CR 52.01. That does not mean that the Court must make a specific finding with respect to each and every bit of testimony offered or with every possible issue raised at trial. Our old Court of Appeals (now our Supreme Court) held in Shepherd v. Shepherd, Ky., 295 S.W.2d 557 (1956) that CR 52.01 was complied with "if the court's opinion shows an understanding analysis of the evidence, a resolution of the material issues of fact that penetrate beneath the generality of ultimate conclusions, and an application of the law to those facts." Id. at 558. Findings of fact should be a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred. Brown Paper Mill Co. V. Irvin, 134 F.2d 337 (8th Cir. 1943). Findings on every issue presented in a case are unnecessary if the trial court has found such essential facts as lay a basis for the decision. It is not necessary for the trial court to prepare elaborate findings on every possible issue raised at trial. Kasuri v. St. Elizabeth Hosp. Medical center, 897 F.2d 845 (6th Cir. 1990); In Re Lemmons & Co., Inc., 742 F.2d 1064 (7th Cir. 1994).

The Respondent forgets that as the finder of fact, it is the prerogative of the Court to decide the veracity of witnesses, and the credibility to be afforded them. Sullivan v. City of Paducah, Ky. App., 547 S.W.2d 769 (1977). As the Sev-

enth Circuit Court of Appeals in In Re Lemmons & Co., Inc., Supra, stated:

> When the district court makes a factual finding, *it must be assumed that conflicting testimony was rejected, even though the trial judge did not expressly state that he refused to credit such testimony.*
>
> Id. At 1070 (Emphasis added).

The findings of fact in this case speak for themselves. To the extent that other facts can be inferred from the facts found that support the Judgment, it is appropriate to assume that the Court found those facts or drew those inferences. Kasuri v. St. Elizabeth Hosp. Medical Center, Supra at 851. To the extent that evidence was presented which in the eyes of the presenter was contrary to the Court's findings, it may be assumed that said evidence was considered and rejected as having probative value. The Court finds no reason to alter, amend, vacate or modify in way whatsoever its November 13, 1997 Judgment.

With respect to the Court's interpretation of the various orders entered by the various Greek Courts, the Court has examined the materials submitted by both parties but finds nothing that causes the Court to change its mind with respect to those orders.

With respect to the request of Respondent to re-open the testimony, the Court recalls that Respondent chose not to call Bronte as a witness, and that Respondent received two days to present her case, while Petitioner received only one. In the Court's opinion, ample time was allowed for Respondent to present her case.

Finally, CR 62 and 65.08 are not applicable to this case. The Court has no authority to order a "stay" of its final judgment, and would not even if it did. The Hague Con-

vention clearly contemplates a forthwith return of the abducted child, and that is what the Court ordered.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that all post judgment motions filed by Respondent, including the motion for stay of proceedings brought under CR 62 and 65.08 are OVERRULED.

This 28th day of January, 1998.

/s/_____
T. STEVEN BLAND, JUDGE
HARDIN CIRCUIT COURT
DIVISION I

Appendix D

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 98-CA-0259-MR

GIA KALYNA JANAKAKIS-KOSTUN, APPELLANT
v.
IN RE THE APPLICATION OF
EMMANUEL JANAKAKIS, APPELLEE

APPEAL FROM HARDIN CIRCUIT COURT
ACTION NO. 97-CI-493

ORDER

This Court having considered appellant's motion for emergency relief filed in conjunction with her motion for intermediate relief pending appeal, and having considered same and being otherwise sufficiently advised, hereby determines that appellant has failed to demonstrate that she will suffer immediate and irreparable injury before the regular motion panel considers the motion for intermediate relief on March 3, 1998. Thus, it is hereby ORDERED that appellant's motion for emergency relief be DENIED.

ENTERED: Feb. 11, 1998

/s/_____
CHIEF JUDGE,
COURT OF APPEALS

Appendix E

SUPREME COURT OF KENTUCKY

98-SC-123-D

GIA KALYNA JANAKAKIS-KOSTUN, APPELLANT
v.
EMMANUEL JANAKAKIS, APPELLEE

IN SUPREME COURT

ORDER GRANTING STAY

Respondent filed a petition in the Hardin Circuit Court seeking the return of the daughter born of the marriage of the parties. The legal basis of the motion is the Convention on the Civil Aspects of International Child Abduction. (The Hague, October 25, 1980) and 42 USC 11603(b), the so-called Child Abduction Remedies Act.

A brief summary of the proceedings will bring the issues into focus. Respondent is a citizen of Greece. Movant is a United States citizen. The couple were married on September 2, 1989, in Athens, Greece. Their daughter was born on October 2, 1991, in Greece. On February 24, 1996, movant told respondent she was leaving Greece and was going to take the child to the United States. Respondent promptly filed a complaint in a Greek court, seeking temporary custody of the child. Following a March 28, 1996, hearing, respondent was awarded temporary custody. The Greek court ordered that the child could not be removed

from Greece until a formal decision was reached. At a later hearing, movant was awarded temporary custody, but the order keeping the child in Greece was left in effect.

On July 1, 1996, respondent gave custody to movant, but visitation rights were reserved for respondent. When he attempted to exercise those rights, he discovered that movant and the child had left Greece. Movant's father, a former Green Beret and probable CIA Agent, may have been involved in helping to remove the movant and the child.

In the spring of 1997, movant and the child moved to Hardin County, where they now reside. The underlying action resulted. The trial court, following an extensively researched opinion, granted respondent's motion and order that the child be delivered to him "Forthwith." Respondent was also ordered not to remove the child from Hardin County "without written order of this Court."

Movant filed an appeal to the Court of Appeals, and also filed a motion for intermediate relief, pending appeal. The latter order was denied by Chief Judge Gudgel on February 11, 1998. That order for relief was affirmed by a three judge panel on March 4, 1998.

On February 17, 1998, movant filed a motion for discretionary review in this Court of the February 11, 1998 order. This motion for an "Emergency Stay" was filed contemporaneously with that motion. CR 76.33.

There is evidence in the Greek trial record that this child is suffering from post traumatic stress syndrome; probable sexual, physical, and emotional abuse; and probable child neglect. This trial court found that, even if true, there was no evidence that respondent is responsible for this condition. The trial court concluded that the testifying doctor's testimony was not "compelling."

This is a close case. Movant certainly does not appeal before this Court with clear hands – vis-à-vis – the direct violation of the Greek court's order and the spy novel-like removal of the child. The undersigned, although recognizing the presumption of accuracy of the finding of the fact of the trial judge, does not share the view of the trial judge as to the testimony of the doctor. There is reliable evidence that the child is suffering from potentially severe problems.

Under these circumstances, and with some reservation, the undersigned believes that there is likelihood of irreparable damage to the child if custody is changed. The undersigned believes that this Court should decide the motion for discretionary review, and then the Court of Appeals should decide the appeals, on the merits, if necessary.

The decision of the Hardin Circuit Court is stayed, pending further order of this Court and the child of the parties is to stay with the movant. Movant is ordered not to remove the child from Hardin County, Kentucky.

ENTERED March 20, 1998.

/s/ _____
Chief Justice

Appendix F

SUPREME COURT OF KENTUCKY

98-SC-123-D
(98-CA-259)

GIA KALYNA JANAKAKIS-KOSTUN, MOVANT
v.
EMMANUEL JANAKAKIS, RESPONDENT

HARDIN CIRCUIT COURT
NO. 97-CI-493

ORDER

The motion for review of the decision of the Court of Appeals is denied.

The order granting a stay, which was issued by this Court on March 20, 1998, is dissolved.

Stephens, C.J., Cooper, Graves, Lambert and Wintersheimer, JJ., concurring.

ENTERED May 14, 1998.

/s/ _____
Chief Justice

Appendix G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

June 18, 1998

Mr. Philip W. Horton
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004

Re: Gia Kalyana Janakakis-Kostun
v. Emmanuel Janakakis
Application No. A-956

Dear Mr. Horton:

The application for a stay pending appeal in the above-entitled case has been presented to Justice Stevens, who on June 18, 1998 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By
/s/_____
Christopher W. Vasil
Deputy Clerk

Appendix H

SUPREME COURT OF KENTUCKY

99-SC-0385-D
(98-CA-0259)

GIA KALYANA JANAKAKIS-KOSTUN, MOVANT
v.
EMMANUEL JANAKAKIS, RESPONDENT

HARDIN CIRCUIT COURT
NO. 97-CI-0493

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED December 9, 1999.

/s/_____
Chief Justice

Appendix I

The SINGLE-JUDGE COURT OF FIRST INSTANCE
OF CHANIA

JUDGMENT NO. 531/1996

Consisting of Styliani Zombola, Chairperson of Judges of Courts of First Instance and Evgenia Kapetanaki, Chief-clerk

Met in public hearing on the 23rd of May 1996 to judge the case between:

THE PETITIONER-DEFENDANT (husband): Emmanuel Tzanakakis, son of Konstantinos, lieutenant commander of the Navy, resident of Souda, who was present with his attorney at law Christina Pateraki, associated with Vasilis Panagiotopoulos, lawyer of Athens.

THE DEFENDANT-PETITIONER (wife): Gia, wife of Emm. Tzanakakis nee Kostun, resident of Souda, who was present with her attorney at law Eleni Kokkinaki, associated with Kyriakos Kokkinos, lawyer of Athens.

The petitioner-defendant (wife) requests that her petition, ref. No. /May 2nd 1996, be accepted and the defendant petitioner (husband) requests that his petition be accepted and they were assigned for the date referred to above.

During the hearing of the case the attorneys at law of the parties set forth their claims and requested that their pleas be accepted.

HAVING STUDIED THE CASE FILES,
CONCLUDED ACCORDING TO THE LAW:

The petitioner (husband) in his petition of March 8th 1996 pleads an urgent condition and requests as a security meas-

ure the adjustment of the use of the family residence of the parties, who are spouses, by changing the residence of the defendant (wife), after she takes the movable goods that are necessary for her separate maintenance. The petition is statutory. It is based on the articles 1386, 1393, 1394 Civil Code, 731, 735 Code of Civil Procedure; it is to be judged in the course of consideration of the security measures (articles 686 fol. C. Civil P.) and must be considered on its merits.

The petitioner (wife) and her petition of May 2nd 1996 pleads an urgent condition and impending danger and requests as a security measures a) that the care of the minor daughter of the parties be assigned to her temporarily, due to a change of conditions subsequent to the issuance of judgment No. 11213/1996 of the Single-Judge Court of First Instance of Athens (Security Measures), which ordered that the care of the minor be shared by both parties and rejected the petition in opposition in that case; and b) that the defendant (husband) be obliged to pay to her temporarily 50,000 drachmas per month as alimony, since she refrains from matrimonial cohabitation for legitimate reasons. This petition is also statutory, since it is based on articles 1392, 1392, 1493, 1496, 1498, 1510, 1511, 1512, 1513, 1518 Civil Code, 728, 729, 735 C. Civil P., it is brought on for consideration through the same procedure, and also must be considered on its merits as well, after having been weighed together with the preceding petition due to its relevance thereto.

The petitioner-defendant (husband) claims that the petition of the defendant-petitioner (wife) is in conflict with the temporary order resulting from the judgment of the Single-Judge Court of First Instance of Athens referred to above; if it is intended to alter and revoke the earlier judgment, this court is incompetent, since according to article 696 & 3 the

Single-Judge Court of First Instance of Athens that issued this judgment is competent to do so. These appeals, though not based on statute, on the one hand, because of the temporary effect of the judgment on security measures, binds the Court and the parties until the existence of new evidence or subsequent is shown. According to articles 696 & 3 C. Civil P. the judgment that ordered security measures but not the one that declined the initial petition, is subject to revocation; therefore a change of condition justifies

The submission of a new petition for security measures (Tzifras: Security measures e. 1980 pp. 68 and 90 fol;, Beis: Civil Procedure in articles 695 and 696 vol. 14, pp. 180 and 193).

From the testimony of the witnesses that were examined in open court, the documents that the parties introduce and invoke, their claims and the hearing of the case, the following findings were considered appropriate: The parties legally performed a civil marriage in Glyfada on September 9th 1989 from which they had a daughter Bronte-Judith-Despina, born on October 2nd 1991. Their matrimonial cohabitation though was not harmonious due to both parties. More specifically the petitioner-defendant (husband), being of a cyclothymic, inconsistent, authoritarian and violent character, and influenced to a large extent by his mother, behaved authoritatively, inconsistently and contemptuously towards the defendant-petitioner (wife), deprived her of every initiative and regularly struck her with his fists and his guns (he is lieutenant commander of the Navy Force), causing her bodily injuries, as well as hitting their minor daughter. But the defendant-petitioner (wife) was also attempting to detach him from his parental family, by convincing him to resign from his service, leave Greece and settle with her in the U.S.A., her country of origin; and in January 1990 she deserted the petitioner-defendant (hus-

band) and returned to the U.S.A. for permanent residence, but returned to Greece, after the petitioner-defendant (husband), having gone to America for this reason, dissuaded her. Due to the fact though that the same problem continued between the parties, the defendant-petitioner (wife) left the conjugal residence again and attempted to depart along with their minor daughter to the U.S.A., which did not happen since the petitioner-defendant (husband) submitted to the Single-Member Court of First Instance of Athens his petition of February 27th 1996, by which he was requested that the care of the minor be given to him temporarily, but the same request was also submitted by the defendant-petitioner (wife) with a counter-petition of her own during the hearing of the above petition. The Single-Judge Court of First Instance of Athens by its judgment No. 11213/96 accepted the petition and declined the counter-petition, and took as a sole security measure the prohibition of exit from Greece of the minor until her care was adjudicated, which care it left to both parties together, with a final court judgment, and after this the defendant-petitioner (wife) took her relevant principal legal action of May 2nd 96. However, after the issuance of the above judgment, and while the first of the petitions to be judged was pending, the defendant-petitioner (wife), due to the difficulties referred to above between them, departed on May 2nd 96 from the conjugal residence, which is the property of the Navy and has been allotted by it to the petitioner defendant (husband) as a family residence, and went to the residence of her father and witness George William Kostun, along with the minor daughter of the parties, but the petitioner-defendant (husband) went there later, took the minor and left, preventing the defendant-petitioner (wife) from continuing to care for her or to communicate with her since then.

In view of all these facts, the Court judges that the care of the minor must temporarily be assigned to her mother, de-

fendant-petitioner (wife), as required by her true interest since due to her infantile age she is in need of the presence and attention of her mother, given that the allegations of the petitioner-defendant (husband) against her were not considered convincing, he himself cannot take care of her due to his work, and the minor when living with him and his mother (her grand-mother) manifests confusion and aggressive and ill-mannered behavior (see testimony of the above witness). On the other hand, the defendant-petitioner (wife) was prohibited following the above judgment of the Single-Judge Court of First Instance of Athens from departing along with the minor from Greece, and has rented a residence in Chania and sought employment with the American Navy Force (naval base of Souda), in order that the petitioner-defendant (husband) is not deprived of his communication with the minor. It was also considered probable that the defendant-petitioner (wife) refrains for legitimate reasons, in view of the above-referenced behavior of the petitioner-defendant (husband), from matrimonial cohabitation and is therefore entitled to alimony, which according to her needs, amounts to 50,000 drachmas per month, an amount that the petitioner-defendant (husband) is in a position to pay without risking his own maintenance, given that his usual monthly salary from his above service, according to the rules of common sense and common experience exceeds the amount of 200,000 drachmas.

Therefore, both petitions should be accepted as substantially well-founded as well, as defined in the pronouncement and each party must pay its own judicial expenses due to their quality of being spouses (article 179 C. Civil P.).

FOR THESE REASONS,

Determining in the presence of both parties,

Judges the petitions of March 8th 96 and May 2nd 96 together;

Accepts them for adjudication;

Adjusts the use of the family residence of the parties and orders the departure of the defendant-petitioner (wife) from it, after she takes the movable goods that are necessary for her separate maintenance;

Assigns temporarily to the defendant-petitioner (wife) the care of the minor daughter of the parties, Bronte-Judith-Despina, until issuance of the final judgment on her main relevant legal action of May 2nd 96;

Compels the petitioner-defendant (husband) to pay temporarily to the defendant-petitioner (wife) as her alimony the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month;

Orders each party to pay its own judicial expenses.

Judged, decided and published on a special public hearing of this Court, on June 24th 1996 in Chania, the parties and their attorneys at law being absent.

THE JUDGE (signed)
TRUE COPY
Chania, June 28th 1996
(signed) ARTEMIS KARTAKI
THE CHIEF-CLERK(signed)
AUTHENTICATED
For legal stamping and issuance
Chania, June 28th 1996
The Secretary
(signed) ARTEMIS KARTAKI

Emanuel Tzanakakis, son of Konstantinos, lieutenant commander of the Navy, resident of Souda Crete, a settlement of the Navy-yard in Crete, has been legally served with notice that he is ordered: a) to deliver the minor child Bronte-Judith-Despina to her mother Gia, wife of Em-

manuel Tzankakis, nee KOSTUN, who has temporary care of the minor, daughter of both parties, until issuance of the final judgment on her relevant main legal action of May 2nd 96, and b) to pay temporarily to Gia, wife of Emmanuel Tzankakis, nee KOSTUN an alimony in the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month, starting on July 1st 1996.

In case of non-compliance the present will be executed in mandatory manner, the costs of execution being charged to the defendant (husband).

Chania, June 28th 1996
The attorney at law
(signed) ELENI KOKKINAKI

Appendix J

INTERNATIONAL CHILD ABDUCTION CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND OTHER GOVERMENTS DONE AT THE HAGUE OCTOBER 25, 1980

* * * *

Article I

The objects of the present Convention are--

a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

* * * *

Article 3

The removal or the retention of a child is to be considered wrongful where--

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason ofjudicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

* * * *

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that--

a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

* * * *

Appendix K

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT, 42 U.S.C. § 11601 *et seq.*

§ 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removal and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

* * * *

§ 11603. Judicial remedies

(a) Jurisdiction of courts

The courts of the State and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence–

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter –

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state and the

habitual residence of a child, include courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuance to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under the laws or international agreements.

* * * *